

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

Supreme Court, U. S.

FILED

24 1977

MICHAEL RODAK, JR., CLERK

No. **77-131** **77-223**

DELAWARE STATE BOARD OF EDUCATION, ET AL.,

Petitioners,

v.

BRENDA EVANS, ET AL.,

Respondents

77-235

77-236

BRIEF IN OPPOSITION TO CERTIORARI

77-239

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TABLE OF CONTENTS

	Page
Brief In Opposition to Certiorari	1
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement	2
A. Introduction	2
B. Prior Proceedings	3
C. The Character of the Inter-District Violation Previously Found by the Three-Judge Court....	10
D. The Scope of the Interim Remedy Ordered by the District Court and Affirmed by the Court of Appeals	15
Reasons Why the Writ Should Be Denied	21
1. Violation	22
2. Remedy	27
Conclusion	31

II

TABLE OF AUTHORITIES

Cases	Page
Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969)	30
Bradley v. School Board of City of Richmond, Virginia, 462 F.2d 1058 (1972), aff'd by an equally divided Court, 412 U.S. 92 (1973)	23 n.15
Brown v. Board of Education, 347 U.S. 483 (1954) 349 U.S. 294 (1955)	<i>passim</i>
Carter v. West Feliciana Parish School Board, 396 U.S. 226 (1969)	30
Castaneda v. Partida, 45 L.W. 4302 (23 March 1977)	26
Dayton Board of Education v. Brinkman, No. 76-539, 45 L.W. 4910 (27 June 1977)	14 n.9, 18, 22, 26 n.18, 27, 28, 29
Edelman v. Jordan, 415 U.S. 651 (1974)	24 n.16
Evans v. Buchanan, 195 F. Supp. 321 (1961)	3, 4
Evans v. Buchanan, 379 F. Supp. 1218 (1974)	3, 4, 10 n.4, 11, 12, 14 n.9
Evans v. Buchanan, 393 F. Supp. 428 (1975)	<i>passim</i>
Evans v. Buchanan, 423 U.S. 963 (1975)	1, 3, 6
Evans v. Buchanan, — F. Supp. — (D. Del. Aug. 5, 1977) (C.A. No. 1816-1822)	18 n.12, 20 n.14
Hicks v. Miranda, 422 U.S. 332 (1975)	24 n.16
Hills v. Gautreaux, 425 U.S. 284 (1976)	19
Hunter v. Erickson, 393 U.S. 385 (1969)	13, 25
Insurance Group v. Denver and Rio Grande Western R. Co., 329 U.S. 607 (1946)	24
Keyes v. School District No. 1, 413 U.S. 189 (1973)	12, 18 n.12, 22, 26 n.18, 27, 28, 29
Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970), aff'd, 402 U.S. 935 (1971)	25
McGinnis v. Royster, 410 U.S. 263 (1973)	26 n.18
Milliken v. Bradley, 418 U.S. 717 (1974)	<i>passim</i>
Reitman v. Mulkey, 387 U.S. 369 (1967)	14 n.9, 25
State Board of Education v. Evans, — U.S. —, 45 L.W. 3394 (29 November 1976)	8

III

TABLE OF AUTHORITIES—Continued

	Page
Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971)	11, 12, 15, 17, 18, 28, 29
United States v. Scotland Neck City Board of Education, 407 U.S. 484 (1972)	14 n.9, 24
Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 97 S. Ct. 555 (1977)	14 n.9, 22, 25, 26, 26 n.18, 27
Washington v. Davis, 426 U.S. 229 (1976)	14 n.9, 22, 25, 26, 26 n.18, 27
Wright v. Council of the City of Emporia, 407 U.S. 451 (1972)	14 n.9, 24, 25
<i>Statutes</i>	
14 Del. C. §§ 1004(c) (2), 1004(c) (4), and 1005....	4
20 U.S.C. § 1701 <i>et seq</i>	15 n.9, 21, 26 n.18
28 U.S.C. § 1253	6
28 U.S.C. § 1254(1)	2
28 U.S.C. § 2281	4

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OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 555 F.2d 373 (1977) and is also set out as Appendix A of the Petition for Writ of Certiorari in *Delaware State Board of Education, et al v. Brenda Evans, et al.*, No. 77-131. The May 19, 1976 Opinion and June 15, 1976 Interim Remedy Judgment of the United States District Court for the District of Delaware are reported at 416 F. Supp. 328 and are set out as Appendix B of the State Board's Petition for Writ of Certiorari. The prior inter-district violation Ruling and Judgment of the District Court are reported at 393 F. Supp. 428 (D. Del. 1975), aff'd 423 U.S. 963 (1975).¹

¹ References to the Court of Appeals' opinion and to the District Court's Interim Remedy Ruling will be to the Appendix in the State Board's Petition for Writ of Certiorari, in the form, for example, of A. 16. Citations to the other opinions and orders in this cause will be in the form, for example, of 393 F. Supp. at 430.

JURISDICTION

The Opinion of the Court of Appeals was entered on May 18, 1977. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether any issue worthy of reexamination by this Court is presented by the District Court's application of *Milliken v. Bradley*, standards to find an inter-district constitutional violation in the operation of the public schools of northern New Castle County.

2. Whether any issue warranting this Court's review is presented by the Court of Appeals' affirmance of the District Court's judgment: (a) delineating, in advance of the submission of an acceptable plan for reassigning students, the geographical area within which desegregation must take place for the scope of the remedy to match the scope of the violation; and (b) establishing a mechanism for organizing the public schools of northern New Castle County into a unitary system which is to become operative only if the State does not prescribe its own mechanism.

STATEMENT

A. Introduction

For the third time in two years, the Delaware State Board of Education and other Petitioners seek to invoke this Court's jurisdiction to review lower court rulings that the State of Delaware has violated the constitutional rights of black Respondents and that a remedy must be adopted that is commensurate with the scope of the violation found. All of these efforts have been undertaken in advance of the adoption of any plan of student assignment to cure the violation found.

As in their last effort to obtain a review, Petitioners persist both in regarding no issue in this case as having been settled by this Court's prior dispositions and in indulging in sweeping mischaracterizations of the findings and conclusions of the lower courts.

It is Respondents' position that the holdings of the courts below through the Court of Appeals' affirmance (555 F.2d 373, A. 1) with modification of the Three-Judge Court's interim remedy ruling (416 F. Supp. 328, A. 32) are in accord with the decisions of this Court dealing both with the violation and standards for framing a remedy.

We also believe that the existence of an inter-district violation has already been settled by this Court's affirmance (423 U.S. 963) of the District Court decision finding such a violation (393 F. Supp. 428) and that there is no occasion for this Court to reexamine its prior disposition. A summary of the violation found and remedial standards applied below may assist this Court in determining whether Petitioners present any issue worthy of review.

B. Prior Proceedings

This is simply the latest phase of a lawsuit begun in 1957 whose "object was to eliminate *de jure* segregation in Delaware schools", including those of New Castle County as well as other districts. 393 F. Supp. at 430. Although a plan for desegregation of Delaware schools was accepted in 1961, the Court approved the plan "only to the extent that it [would prove] effective", 379 F. Supp. 1218, 1223 (1974); and retained jurisdiction, 195 F. Supp. 321, 325 (1961). The plan did not prove effective in New Castle County. 379 F. Supp. at 1223 and 1228-30; 393 F. Supp. at 432, 437-8.

The inter-district violations later found were rooted in circumstances existing at the time of *Brown v. Board of Education*. Local school districts in Delaware at that time

were "not meaningfully 'separate and autonomous'", 393 F. Supp. at 437, but rather were subordinate to the State system of segregation with boundaries that were dual and overlapping, permeable, or disregarded for the purpose of imposing racially segregated schooling. To deal with this, the District Court's 1961 decree ordered that as part of the plan for desegregation, the State Board submit a revised school code to the legislature, including a reorganization of the "crazy quilt-pattern of [school] districts and laws governing education." 195 F. Supp. at 325.

In belated response, the legislature in 1968 enacted the Educational Advancement Act which explicitly excluded the Wilmington school district from the discretion vested in the State Board to reorganize all districts in the state, expressly providing that the boundaries for this "reorganized school district shall be the City of Wilmington with the territory within its limits." 14 Del. C. §§ 1004 (c) (2), 1004 (c) (4), and 1005.

In 1971, plaintiffs, by amended complaint, petitioned the District Court for supplemental relief; challenged the constitutionality of the 1968 Act and redistricting; and requested that the continuing inter-district segregation in New Castle County be finally and effectively dismantled. A three-Judge Court was convened pursuant to 22 U.S.C. 2281. On July 12, 1974, following a lengthy evidentiary hearing, briefs and argument, the District Court found continuing *de jure* violations within Wilmington, but reserved ruling on the claims of inter-district segregation including the constitutionality of the 1968 Act. 379 F. Supp. 1218.

After this Court issued its opinions in *Milliken v. Bradley*, 418 U.S. 717 (1974) the District Court promptly invited the reorganized school districts of New Castle County to intervene and present evidence on all the issues raised by plaintiffs' 1971 Petition for Supplemental Relief

and Amended Complaint. Suburban school districts intervened as parties defendant;² they elected to adopt the State Board pleadings and to stand on the evidence already of record and to submit briefs on the inter-district violation issues and the impact of *Milliken*. Primary issues litigated by the parties included the alleged continuing nature of the historic inter-district dual system; the purpose and effect of acts following *Brown*, including a state-wide reorganization of school districts, alleged to be either independent constitutional violations or ineffective means of eliminating the continuing effects of the inter-district *de jure* segregation; and the extent to which the existing racial disparity in enrollments between Wilmington and suburban New Castle County school districts resulted from the inter-district effect of any constitutional violations rather than other causes. On March 27, 1975, the District Court, Judge Layton dissenting, issued its Opinion. Applying the *Milliken* legal standards to the evidence adduced, the District Court found significant inter-district *de jure* segregation throughout New Castle County. 393 F. Supp. at 431-2, 438, 445, 447. Specifically, the District Court found an inter-district violation based on "(a) a historic arrangement for inter-district segregation within New Castle County; (b) significant governmental involvement in inter-district discrimination; and (c) unconstitutional exclusion of Wilmington from consideration for consolidation by the State Board of Education pursuant to reorganization powers now lapsed." 393 F. Supp. at 445. The District Court further found the inter-district violation "responsible to a significant degree for the increasing disparity in residential and school populations between Wilmington and its suburbs in the past two decades." 393 F. Supp. at 438. See also, 393 F. Supp. at 444-5. Accordingly, the Court directed the parties to sub-

² The Wilmington school district had previously intervened as a party plaintiff and joined in the Petition and Amended Complaint.

mit alternative inter-district and intra-district desegregation plans. 393 F. Supp. at 447.

The State Board appealed the inter-district violation Judgment and Order invoking this Court's jurisdiction under 28 U.S.C. 1253. In its Jurisdictional Statement, the Appellant State Board argued that the findings of a substantial inter-district violation were incorrect. Appellees filed a Motion to Dismiss or Affirm, arguing that there were substantial grounds for either disposition. This Court summarily affirmed, Rehnquist, J. joined by Burger, C. J., and Powell, J., dissenting, on grounds that the appeal did not lie under 28 U.S.C. 1253 within the Supreme Court's jurisdiction because the case was not one required to be heard by a three-judge court. 423 U.S. 963.

In August 1975, the parties submitted desegregation plans to the District Court. There followed three weeks of evidentiary hearings during which defendants again had the opportunity to present proof that the public school segregation existing in New Castle County, beyond that already determined to be the product of *de jure* acts, was not attributable to a discriminatory purpose or the reciprocal effect of the deliberately discriminatory actions already adjudicated. On May 19, 1976, the District Court, Judge Layton dissenting in part, issued its Interim Remedy Ruling, followed by the Interim Remedy Order on June 15, 1976.

The Court reiterated its findings concerning the extent of the effects of the inter-district violation: "[t]he acts described in the prior opinions were the acts of the State and its subdivisions and had a substantial not a *de minimis* effect on the enrollment patterns of the separate districts . . . The State Legislature and the State Board of Education . . . acted in a fashion that is a substantial and proximate cause of the existing disparities in racial enrollments in the districts in northern New Castle County." (A. 52-3). The Court determined that a Wil-

mington-only plan would not satisfy its duty to place the victims of the violation in substantially the position they would have occupied had the violation not occurred and that this duty, when viewed in the light of the extent of the inter-district violation, required the inclusion of all but one of the twelve New Castle County districts in the area in which desegregation would take place. A. 55, 60, 78-82. Rather than selecting any of the various plans submitted, the Court established an interim framework for developing an effective remedy. A. 76-94. Contrary to appellants' assertion that the Court provided "that eleven of the twelve districts in New Castle County be collapsed into a single super-district . . .," (State Board Pet. p. 8), the Court simply required that desegregation take place in accordance with the Opinions of the Court and that the State Board of Education establish an interim board drawn from the local districts which would serve as a consolidated body, pursuant to the State law model, to implement a desegregation plan only if the State failed to take action to remedy the inter-district segregation flowing from the violation. A. 74-78, 85-88.

Petitioners again sought review in this Court, praying that the Court either note probable jurisdiction or, in the alternative, grant certiorari prior to judgment by the Court of Appeals. In their jurisdictional statements they again challenged the existence of the inter-district violation as well as the remedy ordered. The Solicitor General filed a memorandum for the United States as *amicus curiae*, arguing *inter alia* (1) that further review of the existence of an inter-district judgment, including the unconstitutionality of the Educational Advancement Act "is foreclosed in substantial measure by [the Supreme] Court' summary affirmance of the judgment on the liability question. . . ." (U.S. Memo, p. 1, n. 1); and (2) that the "significant and continuing inter-district acts of racial discrimination between New Castle County school districts . . . would [in any event] require a significant

inter-district remedy." (P. 9). In the Solicitor's view, it followed from this understanding of the posture of the case that direct appeal did not lie because the interim remedy judgment was not required to be entered by a three-judge court. On November 29, 1976, this Court dismissed appellants' direct appeals, *State Board of Education v. Evans*, — U.S. —, 45 U.S.L.W. 3394. (29 November 1976)

Appellants then pursued their appeals in the Court of Appeals for the Third Circuit under an expedited briefing schedule. Following oral argument before the Court sitting *en banc*, on May 18, 1977 the Court issued its opinion and judgment, affirming the judgment below with certain modifications largely designed to give the State Legislature or the State Board of Education a further opportunity to prescribe the plan and method of reorganization that would eliminate the dual system and the vestige effects of *de jure* segregation. A. 20-4. The court viewed itself as precluded by this Court's summary affirmance from reexamining the existence of a substantial inter-district violation. A. 12-14. But, in reviewing the District Court's decision concerning the scope of remedy, the Court of Appeals examined the extent of the inter-district violation, for it recognized that "[t]he existence of a constitutional violation does not authorize a court to bring about conditions that never would have existed even if there had been no constitutional violation . . . the school district and its students are to be returned, as nearly as possible, to the position they would have been in but for the constitutional violations that have been found." A. 16-17. Having conducted this review, the court affirmed the District Court's decision concerning the appropriate extent of the desegregation area along with other aspects of the remedial framework. The Court of Appeals, however, refused to embrace the Three-Judge court's description of "*prima facie* desegregated schools" as those having an

enrollment not substantially disproportionate to the overall inter-district racial enrollment insofar as it might be interpreted by others as imposing a racial quota. A. 18-19.

Judge Garth, joined by Judges Rosenn and Hunter, dissented on grounds that the majority had failed (1) to review the existence of inter-district violations and to identify them specifically; and (2) to assess the effects of the violations on the racial composition of schools in northern New Castle County. A. 25. They would have remanded the case to the District Court to require a precise finding of racially discriminatory intent with respect to each inter-district violation³ and a precise calibration of the extent to which segregation in northern New Castle County was caused by the inter-district violations as against other, presumably nondiscriminatory factors. A. 38-41. The dissent, however, failed to state in what respect the specific findings of the Three-Judge Court concerning the nature of the inter-district violation and the extent of its impact on northern New Castle County fell short of meeting these requirements.

The State Board of Education and suburban school districts now petition for a writ of certiorari, seeking a plenary review of all material issues previously adjudicated by the lower courts.

³ The dissenters perceived eight inter-district violations, a number they apparently arrived at by regarding each element of discrimination that underlay the findings of "significant governmental involvement in inter-district discrimination" as a separate inter-district violation. They acknowledged, however, that the racially discriminatory motivation of several of these elements was obvious. A. 39. They neither mentioned or considered the historic inter-district violation and its impact on the analysis of subsequent acts and failures to act.

**C. The Character of the Inter-District Violation
Previously Found by the Three-Judge Court**

The District Court's finding of a continuing inter-district violation in New Castle County was based on a careful application of *Milliken* legal standards to the record evidence. The deliberate character and broad extent of the violation were detailed in the District Court's 1975 findings and may be summarized as follows:

1. At the time of *Brown*, and for some time thereafter, the state-imposed system of complete segregation "in New Castle County was a cooperative venture involving both [Wilmington] city and suburbs . . . [A]t that time, a desegregation decree could properly have considered city and suburbs together for the purpose of remedy. At that time, in other words, Wilmington and suburban districts were not meaningfully 'separate and autonomous.'" 393 F. Supp. at 437. This ultimate finding was based on subsidiary findings of fact that local districts were then subordinate and their boundaries dual or overlapping or simply breached in order to implement the basically monolithic Delaware system of school segregation, with one state system of schooling for blacks and another for whites. Although the specifics of this unique system varied somewhat from place to place and time to time, 393 F. Supp. at 433, it was unmistakably "a historic arrangement for inter-district segregation within New Castle County." 393 F. Supp. at 447.

2. Far from effectively dismantling the system of state-compelled inter-district segregation, Delaware of-

⁴ Thus, for example, the State-mandated and State-financed black elementary, junior and senior high schools located within Wilmington long served substantial numbers of black children who resided throughout New Castle County. 393 F. Supp. at 433. Likewise, *de jure* white schools located in Wilmington served substantial numbers of white children who resided in New Castle County. *Id.* See also, 379 F. Supp. at 1230-31 (Circuit Judge Gibbons, separate opinion).

officials perpetuated and exacerbated the original violation. 379 F. Supp. 1230-2, 393 F. Supp. 432-445. Over the next two decades, there occurred, as the District Court found, "significant governmental involvement in inter-district discrimination." 393 F. Supp. at 447. This involvement not only made the dismantling of the historic inter-district segregation of New Castle County much more difficult, 393 F. Supp. at 432-3 [Cf. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 14 (1971)], but was also found by the District Court to be an independent constitutional violation under *Milliken*, significantly contributing to the marked inter-district segregation flourishing in New Castle County schools. 393 F. Supp. at 438.

Through a series of specific public actions, governmental authorities supported and encouraged pervasive practices of racial discrimination in suburban housing.⁶ This government-sanctioned discrimination⁷ excluded

⁵ This discrimination occurred during a period of great population growth and demographic change. From 1954 to 1973, the public school enrollment of suburban New Castle County expanded from 21,543 children (4 percent of whom were black) to 73,008 (6 percent of whom were black). This large suburban population growth corresponded with the growth of Wilmington as an identifiably black school system, changing from 12,875 pupils in 1954 (28 percent black) to 14,688 pupils in 1973 (83 percent black).

⁶ During this period, some time after *Brown*, suburban children were withdrawn from Wilmington schools, which "reduced, to an extent, the proportionate white enrollment" of Wilmington schools. 393 F. Supp. at 434 n. 8. While the District Court did not find this to be an independent violation under *Milliken*, it was a further step in the continuing separation of the races in New Castle County; and the District Court found that the contemporaneous splintering of the suburban districts from Wilmington failed to disestablish the inter-district dual system. 393 F. Supp. at 433, 437-8, 379 F. Supp. at 1228-1230 (Circuit Judge Gibbons, separate opinion).

⁷ Governmental acts included policies advocating racially homogeneous neighborhoods as a condition of government assistance, the continued recordation of racially restrictive covenants after they

black families from new housing opportunities in the suburbs, thus excluding them from the burgeoning and still virtually all-white suburban schools, and funneled them into Wilmington, 393 F. Supp. at 434-5. At the same time, state public housing authorities acted directly to impose racial segregation by concentrating low income housing for minority residents in the city of Wilmington and virtually excluding such units from the suburbs, thus excluding many black children from suburban schools. 393 F. Supp. at 435. In finding that this conduct constituted segregative action with inter-district effects, the District Court cited Mr. Justice Stewart's concurrence in *Milliken* noting that an inter-district violation is established when state officials "had contributed to the separation of the races . . . by purposefully racially discriminatory use of state housing or zoning laws." 418 U.S. at 755.

In addition the Wilmington Board, with the sanction of the State Board, maintained five pre-*Brown* "colored" schools as virtually all-black schools and implemented discriminatory policies (e.g., optional zones) to define additional schools as *de jure* black, with the effect of encouraging white outmigration and discouraging white families from moving in to Wilmington. 393 F. Supp. at 436. See, also, 379 F. Supp. at 1223.* Subsequently, the State also subsidized the transfer of substantial numbers of white Wilmington children to private schools in the sub-

were declared unenforceable by this Court, State publication of the discriminatory code of ethics of the real estate industry and sanction of restrictive real estate practices that denied minority home-seekers access to all but a handful of suburban listings. 393 F. Supp. at 434-5. 7

* Thus were Wilmington schools "earmarked" as the "black schools" to all who cared to see throughout New Castle County. Cf. *Keyes v. School District No. 1*, 413 U.S. 189, 202 (1973). (The District Court credited testimony that sales in the housing market are tied to the racial characteristics of the schools. 393 F. Supp. at 437. Cf. *Swann*, 402 U.S. at 20-21.)

urbs. This, too, "has undoubtedly served to augment the racial disparity between Wilmington and suburban public school populations." 393 F. Supp. at 437. These findings of the District Court conformed closely to the standard set for an inter-district violation in *Milliken* that "there has been a constitutional violation within one district that produces a significant segregative effect in another district." 418 U.S. at 745.

Thus, during the decades after *Brown*, the Court found that the historic, county-wide arrangement for inter-district segregation, far from being dismantled, was continued and significantly exacerbated by this variety of racially discriminatory governmental conduct. Applying the *Milliken* standards, the District Court concluded that these inter-district segregation practices "are responsible to a significant degree" for the marked disparity between Wilmington and suburban New Castle County school districts, 393 F. Supp. at 432.

3. Finally, against this background of continuing inter-district segregation the District Court found that the Educational Advancement Act and statewide reorganization of school districts in 1968 "contributed to the separation of the races by . . . drawing or redrawing of school district lines" (Cf. *Milliken*, 418 U.S. at 755, Stewart J., concurring), thereby further isolating Wilmington's basically black schools from their suburban and virtually all-white counterparts by discriminatory state action. 393 F. Supp. at 445-6. The District Court based this declaration of unconstitutionality on a careful analysis of the specific provisions and operation of the Act, as well as their historical context, immediate objective and ultimate effect. It found the exclusion of Wilmington in the circumstances to be a suspect racial classification of the kind invalidated by this Court in *Hunter v. Erickson*, 393 U.S. 385 (1969). After considering the purported justifications and the alternatives proposed and studied,

the Court concluded that defendants had not met their burden of justifying the statute's disparate treatment of racial problems. 393 F. Supp. at 438-446. The Court found:

Accordingly, the language of the Act excluding Wilmington from consideration by the State Board for reorganization violates the Equal Protection Clause . . . [T]he reorganization provisions played a significant part in maintaining the racial identifiability of Wilmington and the suburban New Castle County school districts.

393 F. Supp. at 445-6.⁹ This inter-district school district

⁹ Given the prior history and continuing inter-district segregation and the outstanding 1961 court order to reorganize school districts state-wide to eliminate all vestiges of the historic dual system, the District Court's evaluation of the 1968 Act and reorganization may be viewed as pursuant to *Wright v. Council of the City of Emporia*, 407 U.S. 451 (1972) and *United States v. Scotland Neck City Board of Education*, 407 U.S. 484 (1972). See 379 F. Supp. at 1225 et. seq. (separate opinion of Circuit Judge Gibbons); 393 F. Supp. at 445; A. 53-54. Under this remedial test, although the District Court found no dominant racial motive in the General Assembly (393 F. Supp. at 445), the Court quite properly held that the Act and reorganization both perpetuated and cemented the prior and continuing inter-district violation. 393 F. Supp. at 445. However, the District Court also found the 1968 Act and reorganization to be an "independent constitutional violation." 393 F. Supp. at 438-446. In this context, it is clear that the Court's statement that the provisions excluding the Wilmington District "were [not] purposefully racially discriminatory" refers to the dominant, subjective motivation of the General Assembly and individual legislators and not to a lack of intentional segregative action. 393 F. Supp. at 439. Cf. *Washington v. Davis*, 426 U.S. 242 (1976); *Village of Arlington Heights v. MHDC*, 429 U.S. 252, 97 S. Ct. 555, 563-565 (1977); *Dayton Board of Education v. Brinkman*, 45 U.S.L.W. 4910 (27 June 1977). The District Court examined the proffered nonracial reasons for Wilmington's exclusion (393 F. Supp. at 439), but found them unpersuasive, noting that the legislature fully appreciated the inter-district segregative effects of its action. 393 F. Supp. at 439. In the totality of the circumstances, the Court found that the Act amounted to "unjustified" or "invidious" racial discrimination. 393 F. Supp. at 445-46 and n. 36. Cf. *Reitman v. Mulkey*, 387 U.S.

boundary violation affected all of New Castle County and implicated every New Castle County school district in the continuing inter-district segregation.

Based on the application of *Milliken* legal standards to the weight of the record evidence, the District Court found a substantial inter-district segregation violation significantly contributing to marked racial disparity between Wilmington and suburban New Castle County school districts. 393 F. Supp. at 438, 445.

D. The Scope of the Interim Remedy Ordered by the District Court and Affirmed by the Court of Appeals

1. In its interim remedy ruling, the District Court began by analyzing the legal standards in *Milliken* and *Swann* that establish the proper scope for the exercise of equitable discretion to order a remedy for the inter-district segregation previously found. A. 50-6. In particular the District Court, in adhering scrupulously to the teachings of *Milliken* and *Swann*, held that the nature and extent of the inter-district violation determine the proper scope of any inter-district remedy (A. 51); that an inter-district violation must be substantial, not *de minimis*, and proximately related to the present disparity in enrollment patterns to require an inter-district remedy (A. 51-2); and that the relief ordered must place the victims of the violation in substantially the position they would have occupied in the absence of the violation by insuring that a racially non-discriminatory system of schools replaces the basically dual system. A. 55. The Court of Appeals confirmed that these were the appropriate constraints in fashioning a remedy, restating them (A. 15-17) and add-

369, 373 (1967). (In later evaluating the Act and reorganization under the "purpose" language of 20 U.S.C. 1715 and 1756, the Court held that it had found the requisite racially discriminatory purpose. A. 94-6.)

ing for emphasis that "[t]he remedy for a constitutional violation may not be designed to eliminate arguably undesirable states of affairs caused by purely private conduct (*de facto* segregation) or by state conduct which has in it no element of racial discrimination." A. 17.

2. Having provided the defendants with another opportunity during the remedial proceedings to demonstrate that the impact of the inter-district violation was limited, the District Court weighed the evidence and again found that the inter-district violation "had a substantial, not a *de minimis* effect on the enrollment patterns of the separate districts." (A. 52). The District Court did not deem it appropriate at that stage of the proceedings to seek to delineate remedy on a school-by-school basis. Rather, it sought to identify the geographical area within which a desegregation remedy would be required. Having found that the racially discriminatory acts of the State and its subdivisions were "a substantial and proximate cause of the existing disparity in racial enrollments in northern New Castle County"¹⁰ (A. 52-3), the Court rejected all plans limiting the remedy to the confines of Wilmington on grounds that they fell far short of remedying the violations previously found. A. 58-60. While affirming that all districts in northern New Castle County were implicated in the violation, the District Court in exercise of its equitable discretion limited the districts to be included in further desegregation planning only to those necessary for continuing and effective relief from the violation. A. 78-82.¹¹

¹⁰ The Court focussed primarily on the northern New Castle County area which comprises 251 square miles with twelve school districts (reorganized in 1968 from nineteen) and 80,678 public school students, 19.4 percent of whom are black. Wilmington schools are 84.7 percent black, while ten of the eleven suburban school districts are more than 90 percent white A. 45-6 and n. 9.

¹¹ This resulted in the exclusion of the one school district (Appoquinimink) most distant from Wilmington because, *inter alia*, its

While refraining from taking a school-by-school approach, the District Court did deem it appropriate to offer a guide to the desegregation planners. Based on its reading of *Swann*, the Court stated that it would consider any school whose enrollments in each grade ranged between 10 and 35 percent black to be a *prima facie* desegregated school. A. 84. The Court made it clear that this was intended as a flexible starting point, a guide not a quota. Newark, for example, was left free to retain one-race schools not only by demonstrating that the *Swann* feasibility standards limited desegregation, but also by showing that "the existence of one-race schools is not due to the maintenance of a dual system." A. 82. The Court of Appeals, however, refused to embrace the 10-35 percent enrollment range because of its view that this flexible range might be interpreted as a fixed requirement. A. 18-19.

Accordingly, the Court of Appeals, applying the remedial standard that "the school system and its students are to be returned, as nearly as possible to the position they would have been but for the constitutional violations that have been found" (A. 16-17), affirmed the District Court's finding of a violation with area-wide impact calling for an area-wide remedy. But the Court of Appeals opinion does not rule out an ultimate desegregation plan which leaves some facilities as one-race schools if it has been demonstrated that this was the distribution that would have existed even in the absence of any constitu-

inclusion would not have any impact on the overall effectiveness of any inter-district plan and its schools already were substantially integrated relative to the areawide racial composition. A. 79. Newark, the other district as to which there was substantial dispute among the parties, was included because, *inter alia* "constitutional violations existed at the State level, and . . . the effects of the pre-*Brown* segregation to which Newark was a party have not yet been dissipated." A. 80.

tional violation. See *Dayton Board of Education v. Brinkman*, No. 76-539, 45 L.W. 4910, 4914 (27 June 1977).¹²

3. In examining various inter-district plans that had been submitted by the parties, the District Court found the use of voluntary transfer plans "as the sole means of system-wide desegregation . . . decidedly unpromising."

A. 64. While noting that "cluster or center plans" proposing mandatory reassignment between the existing Wilmington and New Castle school districts would be manageable and provide an effective remedy, the District Court found that the assignment of pupils across district lines would be difficult to administer and might require continuing judicial supervision to resolve disputes. A. 67. Seeking to follow a course that would require the least judicial intervention, the Court, in exercise of its equitable discretion, declined to order "cluster and center plans." A. 68.

¹² Defendants, however, failed in the violation and remedy hearings to adduce persuasive evidence that the existing racial disparity in enrollments between northern New Castle County school districts resulted from factors other than the constitutional violation found; their evidence failed to counter persuasive evidence offered by plaintiffs to the contrary. Most recently, on July 14, as the District Court has reported, the State took the position that "it is not 'feasible' to determine what the affected school districts and school populations would be today 'but for' the constitutional violation found by the Three-Judge Court and affirmed on appeal." *Evans v. Buchanan*, — F. Supp. — (D. Del. Aug. 5, 1977) (C.A. No. 1816-1822), Mimeo op. at 14. Whatever its utility in other situations, this representation by defendants in a case where a substantial *de jure* violation has been determined hardly serves to meet their burden of proving that the segregation remaining in the area was not similarly caused. *Keyes v. School District No. 1*, 412 U.S. 189, 208-209. This final default by defendants provides further justification for a conclusion that the segregative effects of the violation on the racial distribution in northern New Castle County are total and pervasive, requiring desegregation of every school in the area except where *Swann* feasibility limitations intrude. See *Dayton Board of Education v. Brinkman*, at 4914. No plan of student reassignment, however, is before this Court.

With respect to the various proposals to redistrict or to consolidate New Castle County districts,¹³ the District Court held that "the power of the Court to order a reorganization would not appear to be in doubt," given the nature and extent of the inter-district violation, particularly in view of the unconstitutional reorganization in 1968 which resulted in the very school districts before the Court as parties. A. 71-72. While redistricting proposals could be implemented pursuant to existing state law provisions, the District Court was concerned about the lack of State Board criteria for determining how to redistrict and the lack of any final decision by the Board on how to accomplish the task A. 73. Accordingly, the District Court determined that *any* redistricting "ought to be dealt with explicitly by State officials" (A. 73):

"Absent such criteria, we feel that the more proper course is to create a situation which will not freeze the district lines by court order, but will create a framework within which the State can make a future determination of proper districts for the area, while insuring that actual desegregation will take place [in the interim]. A. 73. See also A. 77-78.

4. The District Court, therefore, set up a procedure which would give state officials the first opportunity to develop an effective reorganization plan. The Court made no "final determination of the organization of the area and of the lines to be followed in setting up such an area . . ." A. 74. Citing *Milliken*, 418 U.S. at 741-742 and *Hills v. Gautreaux*, 425 U.S. 284 (1976), the Court noted that "[s]uch decisions are far better left to legislators and the process of compromise than to the rigors of judicial determination. 418 U.S. at 744." A. 75. It added that "[d]eterminations of methods of governance, and

¹³ For example the State Board proposed a redistricting plan creating five new districts, each with one or more of the existing districts and one-fifth of Wilmington. A. 69.

the day-to-day operations of the schools will be left in the hands of appropriate local officials. This Court should have no need to interfere in those decisions, unless they violate federal law or constitutional provisions." A. 75.

However, to avoid a stalemate and to insure the elimination of the inter-district segregation found, the District Court provided for an interim consolidation and interim board drawn from the local districts to begin planning and to insure implementation should the State fail to take prompt and effective action. A. 74, 85. To allow time for State officials to act with regard to the organizational structure and for the interim board to plan for necessary pupil reassignments, the Court stayed portions of its judgment until September, 1977. A. 97-8. If the State had not acted by that time under the decree the standby procedure already underway establishing an interim consolidated Board was to become fully effective. A. 74-5, 77-8, 85, 87. The Court reiterated that this "reorganization . . . is effective only in the absence of proper State action to change it." A. 75. In its general affirmance of the remedial framework, the Court of Appeals declared "[w]e specifically affirm this governance plan and emphasize that prompt compliance by the State make action by the interim board unnecessary." A. 19.¹⁴

¹⁴ The Court of Appeals ruling and mandate, entered by the District Court on May 19, 1977, directed that the State Board (or other appropriate State authority) file with the District Court "within sixty days [of May 18, 1977] a formal report of its efforts to carry out the mandate of the District Court." A. 21. In an opinion issued on August 5, 1977, the District Court noted that the State Board report, submitted on July 14, "disclosed that the only concrete measure which had been taken since entry of the Three-Judge Court remedy order was passage of legislation authorizing majority to minority voluntary transfers," which would permit black students from the Wilmington and DeLa Warr Districts to enroll in other districts and white students in the other districts to transfer to Wilmington or DeLa Warr. *Evans v. Buchanan*, — F. Supp. — (D. Del. Aug. 5, 1977) (C.A. No. 1816-1822) Mimeo op. at 9.

[Footnote continued on page 21]

5. Finally, the District Court evaluated its proposed remedial framework under the provisions of the Equal Educational Opportunity Act of 1974, 20 U.S.C. 1701, et seq. The District Court "complied fully with the statutory requirements applicable here." A. 94. Of particular relevance, the Court held that its prior finding on inter-district violations, including the 1968 Act and reorganization, were findings of the racially discriminatory purpose and inter-district effect contemplated under 20 U.S.C. 1715 and 1756. A. 96.

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioners' attempt to reshape the facts and holdings of this case to fit those of cases in which lower courts failed to apply proper legal standards does not withstand scrutiny of the opinions below. The holdings below dealing both with the nature of the violation and with the appropriate standards for framing a remedy are in accord with applicable decisions of this Court and are a manifestly correct application of those decisions. In this case the Three-Judge Court made the detailed factual inquiry and by specific fact findings traced the history of the inter-

¹⁴ [Continued]

The District Court found this action a totally ineffective remedy as only a small portion of the black students and almost no white students had exercised this option. The Court further found the State Board's additional proposal of "reverse voluntarism", under which all Wilmington black students would be assigned to suburban districts in northern New Castle County with the absolute right to remain in or return to black schools in Wilmington, to be procedurally flawed, substantively ineffective and racially inequitable. Having found the State Board in default, the District Court viewed its responsibility under the Third Circuit mandate as requiring the State Board to appoint a five-member New Board charged with the duty of planning and implementing a single-district remedy. In doing so, however, the District Court stayed the requirement that desegregation at the high school level begin in September, 1977, pending this Court's disposition of the present Petitions for Certiorari.

district violation and the extent of its effects. Applying proper legal standards, the Three-Judge Court then provided for a remedy limited to the scope of the violation and that would intrude on legitimate State and local authority as little as possible. The Court of Appeals carefully reviewed these findings and the record evidence in light of the applicable legal standards, rather than substituting its judgment for that of the District Court, and affirmed with modifications the Interim Remedy Ruling. Accordingly, the Third Circuit's judgment presents no new or important issue worthy of review.

1. *Violation.* The Petitioners' attack on the 1975 violation holdings of the District Court consists of two well-rehearsed claims. The first is that the District Court's findings of "significant governmental involvement in inter-district discrimination" (393 F. Supp. at 447) were not supported by a showing of racial intent. (State Bd. Pet., p. 15). The second is that the Court's finding that the Educational Advancement Act of 1968 and reorganization unconstitutionally excluded Wilmington contained a specific negation of discriminatory intent. (State Bd. Pet., p. 15).

a. In the Statement, *supra*, pp. 10-15, we have summarized the detailed nature of the District Court's findings concerning each of these assertions. The holding of significant governmental involvement in inter-district discrimination was not simply conclusory, but was based on a series of specific findings concerning public acts of deliberate discrimination. Statement, pp. 10-15. These acts clearly meet the standards of racial purpose established by this Court in *Keyes v. School District No. 1*, and reaffirmed in *Washington v. Davis*, *Village of Arlington Heights v. MHDC*, and *Dayton Board of Education v. Brinkman*. Unlike the racial imbalance and recission of a voluntary plan findings in *Dayton*, the governmental practices found by the District Court here were

not arguably racially neutral or the results adventitious. The District Court also recognized that under *Milliken* findings of purposeful segregation alone would not be sufficient to sustain an inter-district remedy absent proof of inter-district effect. Applying *Milliken* standards to determine the inter-district impact of the violation, the Court found these acts a proximate cause of the existing disparity in enrollments between Wilmington and suburban New Castle County school districts, 393 F. Supp. at 438.

After carefully assessing the evidence, the District Court found that the deliberate acts of discrimination of government officials, wholly apart from the Educational Advancement Act of 1968 and reorganization, met the standards for an inter-district violation set down in *Milliken* in that (1) the discriminatory acts of school officials in Wilmington were a constitutional violation that produced a significant segregative effect in other districts (418 U.S. at 745); and (2) the purposeful racially discriminatory use of State housing laws had contributed to the separation of the races in schools throughout northern New Castle County (418 U.S. at 755, Stewart, J., concurring). The District Court also determined pursuant to *Milliken* (418 U.S. at 744-745) that these and other acts, regardless of purpose, served to perpetuate rather than to dismantle the historic arrangement for inter-district segregation.¹⁵

¹⁵ These findings are to be sharply distinguished from those of lower courts in Detroit and Richmond where there were no findings of inter-district violations significantly affecting the racial composition of schools in either metropolitan area. In Detroit, the lower court findings focussed only on violations and effects within the Detroit School District. *Milliken v. Bradley*, 418 U.S. at 744-51. In Richmond, racially discriminatory acts were not found to have contributed to the disparity in pupil enrollments between the historically separate Richmond, Henrico and Chesterfield school districts. *Bradley v. School Board of City of Richmond, Virginia*, 462 F.2d 1058, 1065-66 (1972).

b. Petitioners' other claim as to violation is their renewed assault upon the District Court's holding that the 1968 Act and reorganization unconstitutionally excluded Wilmington from consolidation. This claim, of course, was necessarily disposed of in this Court's summary affirmation of the Three-Judge court opinion holding the Act unconstitutional.¹⁶ While this Court is always free to reexamine its prior judgments, it will do so only in unusual circumstances. See, e.g., *Insurance Group v. Denver and Rio Grande Western R. Co.*, 329 U.S. 607, 611-612 (1946). The Petitioners' well-rehearsed contention that the District Court's holding of unconstitutionality was defective for a lack of finding of racially discriminatory purpose presents no such circumstances because the contention lacks merit.

First, given the District Court's findings of an historic arrangement for inter-district segregation, a failure to eliminate the vestiges of the State system for imposing segregation and the continuing acts of discrimination in the two decades after *Brown*, the remedial standard of the *Emporia* and *Scotland Neck* cases are applicable. The issue was whether the 1968 Act and reorganization maintained or effectively dismantled the prior and continuing inter-district segregation in New Castle County. See, 407 U.S. at 451, 460; 407 U.S. at 489-490. In such circumstances, there was "no need to find [the 1968 Act] an independent constitutional viola-

¹⁶ Whatever the precedential meaning of such a summary affirmation for future cases (see, *Edelman v. Jordan*, 415 U.S. 651, 670-671 (1974)), it is a decision on the merits dispositive of the inter-district liability issue in this, the same case. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975). Even if the scope of prior review was limited to whether the interlocutory relief ordered was an abuse of discretion, the summary affirmation is still properly regarded as dispositive since it would have been a clear abuse of discretion for the District Court to order planning for inter-district desegregation if there were not a substantial inter-district violation.

tion." *Washington v. Davis*, 426 U.S. 229, 243, quoting from *Emporia*, 407 U.S. at 459.

Second, as set forth in the Statement, *supra*, pp. 13-14, the District Court found the 1968 Act and reorganization an independent constitutional violation after a careful analysis of "the totality of the relevant facts." *Washington v. Davis*, 426 U.S. at 229, 242. The District Court "quite properly undertook to examine the constitutionality of the [Act] in terms of its 'immediate objective' and its 'historical' context and the conditions existing prior to its enactment." *Reitman v. Mulkey*, 387 U.S. 369, 373 (1967). See, *Village of Arlington Heights v. MHDC*, 97 S. Ct. 555, 564-5. Having conducted this examination the Court found that the Act was a "racial classification" of the kind invalidated by this Court in *Hunter v. Erickson*, 393 U.S. 385, in that it treated racial problems differently from related governmental interests.¹⁷ Cf. *Lee v. Nyquist*, 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971). It thus found that plaintiffs had made out a *prima facie* case of unconstitutional racial discrimination, not just disproportionate racial "impact". The District Court therefore shifted "the burden of proof" to the defendants to justify the 1968 Act and reorganization. *Id.* The District Court's finding that on balance the justifications proffered by Appellants were insufficient

¹⁷ The Education Advancement Act reorganized Wilmington along its existing lines and singled it out for exclusion from consideration at a time when: (a) the dual system within Wilmington's borders had not yet been fully dismantled; (b) the Wilmington system, which contained nearly half the black children in the State had become identifiably black especially in contrast with surrounding suburban New Castle County districts; (c) racially discriminatory State policies had excluded black people from suburban New Castle County and contributed to the development of identifiably white schools; and (d) the effects of the historic inter-district system of segregation between Wilmington and suburban New Castle County school districts persisted. All of this was part of the "historical context and the conditions existing prior to enactment."

to rebut the *prima facie* case and that portions of the 1968 Act and reorganization amounted to "invidious discrimination" (393 F. Supp. at 446 n. 36) was squarely the result of the "sensitive inquiry" called for by *Arlington Heights* to determine whether "invidious discriminatory purpose was a motivating factor." 97 S. Ct. at 564.¹⁸ See also *Castaneda v. Partida*, 45 L.W. 4302 (23 March 1977). Thus, it is manifest that the District Court's analysis and judgment of the 1968 Act and reorganization were not based or "trigger[ed]" "solely" on "racially disproportionate impact," *Washington v. Davis*,

¹⁸ While the District Court used the phrase "invidious discrimination" rather than "racially discriminatory purpose", this semantic distinction is of no moment. Nor is it of moment that the District Court stated that it could not conclude "that the provisions excluding the Wilmington District from school reorganization were purposefully racially discriminatory." 393 F. Supp. at 439. In making this statement, the District Court was referring to the dominant "subjective intent of the decisionmaker," *Washington v. Davis*, 426 U.S. 229, 252 (Stevens, J., concurring), *Dayton Board of Education*, 45 U.S.L.W. at 4910, 4915 (Stevens, J., concurring), and not a "purpose" or "intent" of the 1968 Act and reorganization in the *Washington* or *Keyes* sense. The District Court made clear that its judgment on the 1968 Act and reorganization included a finding of racially discriminatory or segregative "purpose" or "intent" in this sense when applying the provisions of 20 U.S.C. 1715 and 1756 to the case. A. 96. Statement, *supra* note 9. As with many State actions, the purposes of the 1968 Act and reorganization were diverse; here, however, one of the purposes was racial discrimination, "maintaining the racial identifiability of Wilmington and the suburban New Castle County school districts." 393 F. Supp. at 495. Compare, *Keyes, v. School District No. 1*, 413 U.S. 189, 210-214, where this Court noted that a State action "to . . . maintain" segregated schooling is *de jure* if "segregative intent" is "among the factors" that motivated the action in question. See, also, *Arlington Heights*, where this Court said that "[r]arely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern or even that a particular purpose was the 'dominant' or 'primary' one", and, quoting *McGinnis v. Royster*, 410 U.S. 263, 276-277 (1973), "[l]egislation is often multi-purposed; the removal of even a 'subordinate' purpose may shift altogether the consensus of legislative judgment supporting the statute."

426 U.S. 229, 239-242. To the contrary, they adhered to the substance of this Court's subsequent opinions in *Washington* and *Arlington Heights*.

Accordingly, the District Court had ample basis for concluding that a further standard for establishing an inter-district violation set down in *Milliken* had been met, i.e., that district lines had been drawn to frustrate the "process of dismantling a dual school system", 418 U.S. at 744, "deliberately . . . on the basis of race", 418 U.S. at 745, and so as to contribute to the separation of the races by drawing or redrawing school district lines", 418 U.S. at 755 (Stewart, J., concurring). See Statement, *supra*, pp. 13-15.

In sum, the District Court's findings with respect to violation fully accord with the standards of racial purpose or intent set down by this Court in *Keyes*, *Washington*, *Arlington Heights* and *Dayton* and with the standards for determining inter-district violations set down in *Milliken*.

2. *Remedy*. The petitioners' attack on the remedial framework adopted by the District Court and affirmed with modifications by the Court of Appeals, while posed in the most amorphous terms (see e.g., State Pet. pp. 16-18), appears to be an assault on the lower courts' delineation of the geographic area in which the remedy was to take place and upon the framework for governance. In both instances, the petitioners' claims lack merit.

a. The District Court, having found a substantial inter-district violation significantly contributing to the existing racial disparity between Wilmington and suburban New Castle County school districts (393 F. Supp. at 438, 445), then properly invited the parties to submit desegregation alternatives and evidence and arguments in support of any plan limiting the extent and geographical scope of an appropriate remedy. See State-

ment, *supra*, p. 16. Although under the principles of *Keyes*, 413 U.S. 189, 208-209, and *Swann*, 402 U.S. at 26, the burden clearly rested with the defendants to justify the exclusion of any segregated area of northern New Castle County as not being the product of segregative intent or the reciprocal effect of the deliberate violation already established, the defendants again failed to sustain their burden in view of the weight of the record evidence. See Statement, *supra*, pp. 16-18. The District Court had ample basis to conclude as it did that the racially discriminatory acts of the State and its subdivisions were "a substantial and proximate cause of the existing disparity in racial enrollments in northern New Castle County." A. 52-3. Because of the area-wide impact of the violation, the District Court, affirmed by the Court of Appeals, properly required an equally extensive area-wide remedy.¹⁹ See *Dayton v. Board of Education*, 45 U.S.L.W. at 4914.

This delineation of the appropriate geographical area for remedy left open the issue of the precise plan for reassignment and on this question, the District Court proposed as a guide, a broad, flexible "starting point" ratio specifically modeled after that approved in *Swann*, 402 U.S. at 24-26. The Court of Appeals, however, disapproved of this portion of the opinion. Statement, *supra*, p. 17. Accordingly, the Court of Appeals opinion makes it clear that the plan for pupil reassignment does not

¹⁹ The Newark School District apparently believes that the Court of Appeals, despite the limited scope of review, was under an obligation to explain in its Opinion why the District Court findings with regard to Newark were not in error (Newark Pet., p. 3). But no basis is offered for the suggestion that the Court of Appeals, in affirming the principal finding of area-wide impact of the violation, did not consider all arguments relating to the subsidiary finding that Newark was properly included because "constitutional violations existed at the State level and . . . the effects of the pre-Brown segregation to which Newark was a party have not yet been dissipated." A. 80.

require racial balance or an application to individual schools of a remedy which goes beyond the scope of the violation. See, Statement, pp. 17-18 and footnote 12. See, also, *Keyes v. School Board No. 1 of Denver*, 413 U.S. 189; *Swann v. Charlotte-Mecklenburg School Board*, 402 U.S. 1; and *Dayton Board of Education v. Brinkman*, 45 U.S.L.W. 4910, 4914.

b. As to the organizational structure of the remedy, the District Court considered three differing approaches presented in the plans: inter-district transfers utilizing existing districts, redistricting and redrawing boundary lines, and consolidation. See Statement, *supra*, pp. 18-19. The District Court's decision to provide a framework for consolidation came only after a careful evaluation of the burdens and inconveniences of each alternative. See Statement, *supra*, pp. 18-19. Guided by this Court's admonitions in *Milliken* to avoid as far as possible judicial entanglement in policy-making or the day-to-day administrative responsibilities of school authorities, 418 U.S. at 744, the District Court found that to prescribe redistricting or inter-district transfers would require the Court either to make difficult policy judgments (A. 73, 77-8) or to resolve day-to-day administrative disputes between school districts (A. 66-8). In contrast, in providing a framework for consolidation (pursuant to existing State law provisions as far as possible and subject to such reorganization and restructuring as the State may enact), the District Court need not intervene further in the operation of the schools. A. 75.

Thus, the District Court chose as a standby, the organizational structure requiring the least judicial intervention, invited the State to substitute its own organizational structure (A. 75) and delayed and staggered implementation over a two-year period to give the State time to act and to permit cooperation and effective planning by all concerned. In its specific affirmance of this gov-

ernance framework, the Court of Appeals emphasized that prompt compliance by the State would make action by the interim board unnecessary (A. 19) and provided the State with yet another opportunity to shape the organizational structure by vesting it with responsibility to appoint a new board even after default. A. 21.

Petitioners nowhere specify in what respect this careful deference to State authority runs afoul of principles declared by this Court in *Milliken* or other cases, and it is difficult to imagine how the courts below could have proceeded more scrupulously to afford the State Board the widest scope for fulfilling its "duty to prescribe appropriate remedies." *Milliken* at 744.

* * *

In sum Petitioners have failed totally to demonstrate any departure by the courts below from this Court's standards for determining violations and the appropriate scope of remedy. To the contrary, the opinions below reveal scrupulous attention to the standards of this Court and careful findings of fact after extensive evidentiary hearings on each relevant issue. Nor do the Petitions demonstrate any novel issue of law or conflict among the Circuits. Rather, Petitioners' requests for certiorari appear to be predicated on the notion that a new decision by this Court standing by itself is a sufficient reason for invoking full review of all lower court school desegregation decisions, for reexamining issues previously decided, and for substituting the judgment of this Court for that of the lower courts. Such a proposition is without any basis. If embraced in a case such as this where remedy has been so long delayed, far from promoting the orderly administration of justice, it would serve to undermine the constitutional entitlement of black children under *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969) and *Carter v. West Feliciana Parish School Board*; 396 U.S. 226; 290 (1969) to timely relief.

CONCLUSION

Wherefore, for the foregoing reasons, the Petition for a Writ of Certiorari should be denied forthwith.

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